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No. 93-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ATLANTIC STATES LEGAL FOUNDATION, INC.,

Petitioner,

vs.

EASTMAN KODAK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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104 pp

QUESTIONS PRESENTED

I. Does the Clean Water Act prohibit the discharge of pollutants not specifically limited in a facility's National/State Pollutant Discharge Elimination System permit?

II. Can a citizen suit under the Clean Water Act be premised solely upon a provision of a state permit program which prohibits the discharge of pollutants not specifically limited in a state permit, where that provision lacks a counterpart in federal law and is therefore broader than federal law?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.1 of the Rules of the Supreme Court of the United States, Defendant-Respondent Eastman Kodak Company discloses that the following companies are subsidiaries and affiliates of Eastman Kodak Company that have issued shares to the public:

India Photographic Company Limited

Nippon System House Co., Ltd.

Sterling Products (Ghana) Ltd.

Sterling Products (Nigeria) Ltd.

Sterling Products Pakistan (Private) Ltd.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vii
CITATION OF OPINIONS	1
RELEVANT STATUTES AND REGULATIONS	1
STATEMENT OF THE CASE	2
I. The Kodak Facility	2
II. The Permit Approval Process	3
III. The Current Lawsuit	4
SUMMARY OF ARGUMENT	5
ARGUMENT	
POINT I	
NEITHER THE CLEAN WATER ACT ITSELF NOR EPA'S IMPLEMENTING REGULATIONS PROHIBIT THE DISCHARGE OF POLLUTANTS NOT SPECIFICALLY LIMITED IN AN NPDES PERMIT	6
A. The Clean Water Act Contemplates the Discharge of Pollutants Not Specifically Limited in an NPDES Permit	6
B. ASLF's View of the Statutory Framework of the Clean Water Act "Stands the [CWA] Scheme on its Head."	8

Page

C. The Second Circuit's Decision is Consistent in Principle with the Supreme Court's Prior Clean Water Act Decisions and Does Not Conflict with Recent District Court Decisions 12

D. EPA Consistently has Concluded that the Clean Water Act Authorizes the Discharge of Pollutants Not Specifically Limited in an NPDES Permit 14

1. Introduction 14

2. EPA's Clean Water Act Implementing Regulations 15

3. NYSDEC's Interpretation of the Clean Water Act is Similar to that Adopted by EPA 20

4. EPA's Approach to Regulating "Non-Limited" Pollutants Protects Against Excessive Discharges 21

5. ASLF's Citizen Suit Represents an Improper Challenge to EPA's Permitting Regulations 21

E. ASLF's Interpretation of the Clean Water Act Would Cripple the NPDES Permitting Program 23

POINT II

A CITIZEN SUIT UNDER SECTION 1365 OF THE CLEAN WATER ACT MAY NOT BE PREMISED SOLELY UPON A PROVISION OF STATE LAW WHICH IS BROADER THAN FEDERAL LAW 25

CONCLUSION 28

Page

APPENDIX

Federal Statutes

33 U.S.C. § 1251 ..... A1

33 U.S.C. § 1311 ..... A2

33 U.S.C. § 1312 ..... A8

33 U.S.C. § 1342 ..... A10

33 U.S.C. § 1365 ..... A16

33 U.S.C. § 1369 ..... A19

33 U.S.C. § 1370 ..... A21

Federal Regulations

40 C.F.R. § 122.21 ..... A23

40 C.F.R. § 122.42 ..... A29

40 C.F.R. § 122.44 ..... A32

40 C.F.R. § 122.62 ..... A36

40 C.F.R. § 123.1 ..... A39

40 C.F.R. § 123.25 ..... A42

40 C.F.R. § 124.5 ..... A47

40 C.F.R. § 124.10 ..... A48

40 C.F.R. § 124.11 ..... A49

40 C.F.R. § 124.12 ..... A50

	Page
40 C.F.R. § 124.13	A52
40 C.F.R. § 125.1	A53
40 C.F.R. § 125.3	A53
New York State Statutes	
N.Y. Envtl. Conserv. Law § 17-0815	A61

TABLE OF AUTHORITIES

Federal Cases	Page
American Association of Meat Processors v. Costle, 556 F.2d 875 (8th Cir. 1977)	22
Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 809 F. Supp. 1040 (W.D.N.Y. 1992)	1, 5, 26
Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d. Cir. 1994)	*passim*
Atlantic States Legal Foundation, Inc. v. Reynolds Metals Co., 31 E.R.C. 1156 (N.D.N.Y. 1990)	14
Chemical Manufacturers Association v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985)	5, 6, 15
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	15
Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub nom., Union Carbide Corp. v. Natural Resources Defense Council, Inc.*, 467 U.S. 1219 (1984)	11
City of Milwaukee v. Illinois, 451 U.S. 304 (1981)	12
E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977)	8, 13
Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (D.C. Cir. 1980), *cert. denied sub nom., Union Carbide Corp. v. Natural Resources Defense Council, Inc.*, 467 U.S. 1219 (1984)	10, 11

Page

Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976) 7, 8, 12

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 27

Homestake Mining Co. v. Environmental Protection Agency, 584 F.2d 862 (8th Cir. 1978) 22

McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182 (E.D. Ca. 1988) 13, 14

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 673 F.2d 400 (D.C. Cir.), *cert. denied sub nom., Chemical Manufacturers Association v. Environmental Protection Agency*, 459 U.S. 879 (1982) 22, 23

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 822 F.2d 104 (D.C. Cir. 1987) 10

Natural Resources Defense Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) 11

Natural Resources Defense Council, Inc. v. Train, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom., Natural Resources Defense Council, Inc. v. Costle*, 12 E.R.C. 1833 (D.D.C. 1979) 10, 11

Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) 27

State of New York v. United States, 620 F. Supp. 374 (E.D.N.Y. 1985) 25

	Page
Sun Enterprises, Ltd. v. Train, 532 F.2d 280 (2d Cir. 1976)	22
United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968 (2d Cir. 1984)	25
United States v. Ketchikan Pulp Co., No. A92-587 Civ. (D. Alaska Oct. 5, 1993)	14
United States v. Tennessee Gas Pipeline Co., No. 91-1428 (W.D. La. Oct. 8, 1991)	14
Federal Statutes	
15 U.S.C. § 2607(b)	23
33 U.S.C. § 1251(a)(1)	1, 6, 12
33 U.S.C. § 1311	1
33 U.S.C. § 1311(a)	4, 8
33 U.S.C. § 1311(b)(1)	7
33 U.S.C. § 1311(b)(2)	7
33 U.S.C. § 1311(b)(2)(A)	9
33 U.S.C. § 1311(b)(2)(A)-(F)	7
33 U.S.C. § 1311(d)	12
33 U.S.C. § 1312(a)	2, 7
33 U.S.C. § 1342	2, 7
33 U.S.C. § 1342(a)	8, 9
33 U.S.C. § 1342(a)(1)(B)	9

	Page
33 U.S.C. § 1342(b)	20
33 U.S.C. § 1342(k)	8, 13
33 U.S.C. § 1365	*passim*
33 U.S.C. § 1369	2
33 U.S.C. § 1369(b)(1)	22
33 U.S.C. § 1369(b)(1)(E)	23
33 U.S.C. § 1369(b)(2)	22
33 U.S.C. § 1370	2, 26
42 U.S.C. § 6901 *et seq.*	27
42 U.S.C. § 11023	24
Legislative History	
Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903	6
Pub. L. No. 92-500, 86 Stat. 816 (1972)	7
Pub. L. No. 95-217, 91 Stat. 1566 (1977)	7, 10
Pub. L. No. 100-4, 101 Stat. 39 (1987)	22
S. Rep. No. 414, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730	24, 25
117 Cong. Rec. S38800 (Nov. 2, 1971) (statement of Sen. Muskie)	6, 7, 12

Federal Regulations	Page
40 C.F.R. § 122.21(g)	2
40 C.F.R. § 122.21(g)(7)	16
40 C.F.R. § 122.21(g)(7)(i)	16
40 C.F.R. § 122.21(g)(7)(ii)	14, 16
40 C.F.R. § 122.21(g)(7)(iii)	16
40 C.F.R. § 122.21(g)(7)(iv)	16
40 C.F.R. § 122.21(g)(9)	16
40 C.F.R. § 122.42(a)	*passim*
40 C.F.R. § 122.44(d)	2, 17
40 C.F.R. § 122.44(e)	2
40 C.F.R. § 122.44(e)(1)	17
40 C.F.R. § 122.61(a) (revised and renumbered as 40 C.F.R. § 122.42(a))	18
40 C.F.R. § 122.62(a)	2, 18
40 C.F.R. § 123.1	2
40 C.F.R. § 123.1(i)	27, 28
40 C.F.R. § 123.25	2, 20
40 C.F.R. § 123.25(a)(13)	18
40 C.F.R. Part 124	22
40 C.F.R. § 124.5	2

	Page
40 C.F.R. § 124.5(a)	17
40 C.F.R. § 124.10	2, 17
40 C.F.R. § 124.11	2, 17
40 C.F.R. § 124.12	2, 17
40 C.F.R. § 125.1	2, 9
40 C.F.R. § 125.3(c)	2, 9
40 C.F.R. § 125.3(d)	2, 9
40 C.F.R. § 271.1(i)	27
Regulatory History	
42 Fed. Reg. 65209 (1977)	19, 20
43 Fed. Reg. 37078 (1978)	18
44 Fed. Reg. 34393 (1979)	16, 19, 20, 21
45 Fed. Reg. 33516 (1980)	17, 19, 20
49 Fed. Reg. 37998 (I984)	18, 19, 20
New York State Statutes	
N.Y. Envtl. Conserv. Law Art. 17, tit. 8	2, 25, 26
N.Y. Envtl. Conserv. Law § 17-0815	2, 26, 27
New York State Regulations	
N.Y. Comp. Codes R. & Regs. tit. 6, Parts 750-758	2, 26

Miscellaneous

Page

Memorandum from EPA Deputy Administrator for Water Enforcement to Regional Enforcement Director, Region V (Apr. 28, 1976) 16

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CITATION OF OPINIONS

The opinion of the United States District Court for the Western District of New York in this matter is set forth at 809 F. Supp. 1040 (W.D.N.Y. 1992). The opinion of the United States Court of Appeals for the Second Circuit in this matter is set forth at 12 F.3d 353 (2d Cir. 1994).

RELEVANT STATUTES AND REGULATIONS

The applicable federal statutes in this case are 33 U.S.C. § 1251 *et seq.*, and more specifically 33 U.S.C. §§ 1251(a)(1), 1311,

1312(a), 1342, 1365, 1369 and 1370. Applicable federal regulations include 40 C.F.R. Parts 122-125, and more specifically 40 C.F.R. §§ 122.21(g), 122.42(a), 122.44(d)-(e), 122.62(a), 123.1, 123.25, 124.5, 124.10-.12, 125.1 and 125.3(c)-(d). Applicable New York State statutes are New York Environmental Conservation Law ("ECL") Article 17, title 8, and more specifically ECL § 17-0815. Applicable New York State regulations are New York Code of Rules and Regulations, Title 6, Parts 750-758. The relevant sections of the above statutes and regulations are reprinted as an Appendix to this brief.

STATEMENT OF THE CASE

I. The Kodak Facility

Kodak operates an industrial facility known as Kodak Park in Rochester, New York. Kodak Park is an approximately 2,100 acre, 480-building facility at which over 20,000 people are employed. The facility manufactures sensitized film and paper, laboratory chemicals, and other products. (JA.95)[1] Wastewater from Kodak Park is collected by an industrial sewer system and treated on-site at Kodak's King's Landing Wastewater Purification Plant (the "Plant"). (JA.95-96)

The treated wastewater is discharged to the Genesee River pursuant to a permit (the "Permit") issued by the New York State Department of Environmental Conservation ("NYSDEC") under the State Pollutant Discharge Elimination System ("SPDES") program. (JA.96) The Permit contains limitations on the discharge of certain substances, as well as sampling, analytical and reporting requirements. In particular, pursuant to the Permit, Kodak analyzes the Plant's discharge for specified substances and reports the results of these analyses to NYSDEC in monthly discharge monitoring reports. The permit also requires Kodak to conduct periodic analyses for additional substances not subject to specific discharge limitations. (JA.55-72, 96)

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[1] Citations to the Joint Appendix on file with the United States Court of Appeals for the Second Circuit are identified as "JA.__".

II. The Permit Approval Process

Kodak obtained its first wastewater discharge permit for Kodak Park in 1975 from the United States Environmental Protection Agency ("EPA") under the National Pollutant Discharge Elimination System ("NPDES") program. In July 1979, Kodak submitted a timely application to renew that permit to NYSDEC, which had been delegated authority by EPA to issue NPDES permits. (JA.97) Over the next five years, Kodak provided NYSDEC with extensive information concerning the use and discharge of chemicals at Kodak Park. In particular, Kodak provided NYSDEC with a completed copy of EPA Form 2C, which solicited monitoring data for 164 pollutants. (JA.97-98, 120-42) Kodak also submitted information concerning over 140 specific chemicals as part of an Industrial Chemical Survey ("ICS"). The ICS required Kodak to disclose whether and in what amounts certain chemicals were used and, if used, whether those chemicals were likely to be present in the facility's wastewater. (JA.98-99, 143-50) Kodak also provided NYSDEC with data concerning other organic chemicals found in its effluent. (JA.99-100)

Based on this information, NYSDEC issued a renewed permit to Kodak, effective November 1, 1984. (JA.55-72, 100) The Permit established specific effluent limitations for only 25 pollutants (JA.56), despite the fact that the information submitted by Kodak showed that the facility was discharging at least 45 substances and was likely to be discharging many others. (JA.97-103, 124-34, 141) The Permit also contained "action levels" for five other pollutants.[2] (JA.58) Finally, the Permit required Kodak to "semi-annually perform a scan . . . of EPA Volatile, Acid and Base/Neutral Fractions and PCB's priority pollutants on a 24-hr. composite sample." (JA.58, 102).

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[2] An action level is a numerical reporting standard. If the action level is exceeded, the permit holder must undertake a short-term, high intensity monitoring program to determine if higher than expected levels of the pollutant are, in fact, being discharged. An action level is not an effluent limit. (JA.58)

Kodak submitted an application to renew the Permit in 1989. The 1984 permit will remain in effect until NYSDEC issues a final determination regarding Kodak's pending application. (JA.102-03) NYSDEC solicited public comments concerning a draft permit in July, 1992. The agency re-noticed a revised draft permit in October 1993 and is expected to issue a final permit shortly.

III. The Current Lawsuit

This action is citizen suit commenced by ASLF pursuant to section 505 of the Clean Water Act ("CWA" or the "Act"). 33 U.S.C. § 1365. ASLF alleges that:

> Kodak has discharged and continues to discharge the pollutants listed below in violation of section 301(a) of the Act, 33 U.S.C. 1311(a), and the express terms and conditions of its NPDES/SPDES Permit No. NY 0001643. Such conditions prohibit the discharge of any pollutants not identified or authorized in the permit. (JA.11, 15)

ASLF's list of 28 "prohibited" pollutants included 13 substances for which Kodak provided information to NYSDEC. (JA.101, 124-34) Eight of the 28 substances are included in the priority pollutant scan required by the Permit. (JA.58, 102)

ASLF filed its complaint in this action in November 1991. (JA.2, 4-10) In August 1992, after extensive discovery, ASLF moved for partial summary judgment as to Kodak's liability under the CWA with respect to 16 of the 28 pollutants included in the complaint. (JA.33) Kodak then moved for summary judgment on the ground that the CWA does not prohibit the discharge of pollutants for which there are no specific effluent limitations contained in an NPDES permit. Kodak further argued that, to the extent the Permit or State law required that no pollutant could be discharged unless it was subject to a specific discharge limitation, any such requirement would be broader than the federal NPDES permit program and thus not enforceable via a citizen suit under the CWA.

The District Court for the Western District of New York denied ASLF's motion for partial summary judgment and granted Kodak's motion for summary judgment, concluding that "when an alleged polluter is subject to a pollution discharge permit issued pursuant to the Clean Water Act, a citizen suit under the Act against the polluter may only address discharges of pollutants expressly regulated by such permit." 809 F. Supp. at 1042. The Court of Appeals for the Second Circuit affirmed, holding first, that the discharge of pollutants for which there are no specific effluent limitations in an NPDES permit is not unlawful under the Clean Water Act and second, that if under state law such a discharge was unlawful, any such requirement would be broader than federal law and, hence, not enforceable under a citizen suit authorized only under federal law. 12 F.3d at 354.[3]

SUMMARY OF ARGUMENT

The Clean Water Act is premised on the notion that imposing discharge limitations on every individual substance discharged from a facility, regardless of quantity or toxicity, is neither feasible nor required. EPA, the agency charged with responsibility for implementing this very complex and technical statute, has interpreted the Act to authorize the discharge of pollutants not specifically limited in an NPDES permit. Consistent with the CWA, EPA solicits information (and establishes effluent limits) for those substances which pose the greatest environmental concern. Discharges of substances not subject to a specific effluent limit are addressed via notification and permit modification provisions.

Based on its review of the Clean Water Act and its implementing regulations, the Second Circuit concluded that EPA's interpretation of the Act is "a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." 12 F.3d at 358 (quoting *Chemical Manufacturers Ass'n v. Natural*

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[3] The Second Circuit also concluded that NYSDEC's view of the NPDES/SPDES permit is the same as that adopted by EPA. 12 F.3d at 359.

Resources Defense Council, Inc., 470 U.S. 116, 125 (1985)). Neither this Court, nor the lower courts have issued any decisions which cast doubt on the Second Circuit's conclusion. To the contrary, as set forth below, the statutory, regulatory and judicial history of the Act overwhelmingly support the conclusion that the CWA does not prohibit the discharge of pollutants not specifically limited in an NPDES permit. To the extent that New York State prohibits the discharge of such pollutants (and evidence suggests it does not), those provisions are broader than the federal program and thus are not enforceable via a citizen suit. For the foregoing reasons, ASLF's Petition for a Writ of Certiorari should be denied.

ARGUMENT

POINT I

NEITHER THE CLEAN WATER ACT ITSELF NOR EPA'S IMPLEMENTING REGULATIONS PROHIBIT THE DISCHARGE OF POLLUTANTS NOT SPECIFICALLY LIMITED IN AN NPDES PERMIT.

A. The Clean Water Act Contemplates the Discharge of Pollutants Not Specifically Limited in an NPDES Permit

Prior to 1972, the federal government regulated water pollution solely through water quality standards.* Congress subsequently rejected this approach as unworkable, enacting in its place the Clean Water Act (the "CWA" or "Act") which directly regulates the *discharge* of pollutants. In enacting the CWA, Congress declared that it was the national goal to eliminate the discharge of pollutants to navigable waters by 1985. 33 U.S.C. § 1251(a)(1). Congress recognized, however, that this goal might not be achievable. As Senator Edmund Muskie, the primary force behind the CWA noted:

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* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903. Under this approach, states were required to classify streams and rivers based on their highest and best use (*e.g.*, drinking water vs. recreation). These uses dictated the level of pollutants which could be discharged.

> [T]he 1985 deadline for achieving no-discharge of pollutants is a policy objective. It is not locked in concrete. It is not enforceable. It simply establishes what the committee thinks ought to be done on the basis of present knowledge.

117 Cong. Rec. S38800 (Nov. 2, 1971). Accordingly, Congress did not require the elimination of all discharges. Instead, it required industries to install the "best available technology *economically achievable*." 33 U.S.C. § 1311(b)(2) (emphasis added). This provision required EPA to establish effluent limitations which would result in "reasonable further progress" toward the elimination of pollutants, taking into account economic and technological limitations.[5] To the extent these technological standards were insufficient to protect water quality, the Act required EPA to establish effluent limitations based on water quality standards. *Id.* § 1312(a).

These effluent limitations are incorporated into an NPDES permit issued pursuant to section 402 of the CWA. 33 U.S.C. § 1342. As this Court noted in *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976), the NPDES permit "serves to transform generally applicable effluent limitations and other standards — including those based on water quality — into the obligations. . .of the individual discharger." *Id.* at 205. Under the CWA, EPA determines the applicable technology-based effluent limitations as well as limitations required to protect water quality. It then issues an NPDES permit to the facility which sets forth specific

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[5] Congress established a two-phase program for reducing the discharge of pollutants. During the first phase, to be implemented by 1977, all industrial pollutant sources were required to apply the "best practicable technology currently available". 33 U.S.C. § 1311(b)(1). During the second phase, to be implemented by 1983, industries were required to apply "the best available technology economically achievable". 33 U.S.C. § 1311(b)(2). *See* Pub. L. No. 92-500, 86 Stat. 816 (1972). Congress subsequently amended this section of the CWA to impose a new schedule which addressed, among other things, the discharge of toxic pollutants. *See* 33 U.S.C. § 1311(b)(2)(A)-(F). *See* Pub. L. No. 95-217, 91 Stat. 1566 (1977).

discharge limits, monitoring requirements, and other conditions which the facility must meet in order to comply with the CWA. The permit thereafter serves as the "principal means of enforcing the [CWA's] pollution control and abatement provisions." *Id.* at 223.

Section 402(k) of the CWA further clarifies the obligations of NPDES permit holders. That section provides that:

> Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of section 309 and 505 [of the Act], with sections 301, 302, 306, 307 and 403 [of the Act]. . . .

33 U.S.C. § 1342(k). In *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977) this Court concluded that:

> The purpose of § 402(k) seems to be to insulate permit holders from changes in various regulations during the period of a permit *and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality.*

Id. at 138 n.28 (emphasis added). This so-called "shield" provision reflects Congress' desire to incorporate all of a facility's obligations under the CWA into a single document — the NPDES permit — and to establish that compliance with the permit constitutes compliance with the CWA.

B. ASLF's View of the Statutory Framework of the Clean Water Act "Stands the [CWA] Scheme on its Head."

ASLF, by focussing on certain provisions of the CWA to the exclusion of others, loses sight of this basic framework and thus concludes, erroneously, that the CWA prohibits the discharge of all pollutants not specifically limited in an NPDES permit. Section 301(a) of the CWA provides that "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402(a), meanwhile, authorizes EPA to issue a permit, notwithstanding section

301(a), "upon condition that such discharge will meet . . . all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of th[e] Act." 33 U.S.C. § 1342(a). Based on these two provisions, ASLF leaps illogically to the conclusion that the CWA prohibits the discharge of all pollutants not subject to specific effluent limitations in an NPDES permit. (ASLF Pet. 11-12)[6] As previously noted, however, the entire CWA is premised on Congress granting to EPA the discretion to establish effluent limitations for a given source category by taking into account environmental, economic and technological considerations. 33 U.S.C. § 1311(b)(2)(A). This means that EPA can decline to limit discharges of certain pollutants if it concludes that the environmental threat posed by the pollutants does not justify regulation. Under these circumstances, ASLF cannot reasonably argue that a permittee, such as Kodak Park, can subsequently be subject to a citizen suit for discharging these same "unregulated" pollutants without an NPDES permit.[7]

The Court of Appeals for the Second Circuit recognized the fallacy of ASLF's approach. According to the Court,

> Atlantic States' view of the regulatory framework stands the [CWA] scheme on its head. Atlantic States

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[6] Citations to ASLF's Petition for Writ of Certiorari are identified as "ASLF Pet. __".

[7] ASLF also argues that where no effluent limitations have been established, the permitting agency must establish effluent limits based on best professional judgment ("BPJ") "for each and every pollutant," pursuant to CWA § 402(a)(1)(B). (ASLF Pet. 26) Section 402(a)(1)(B) authorizes EPA to issue an NPDES discharge permit for the discharge of any pollutant on the condition that the discharge will meet either applicable effluent standards and requirements or "prior to the taking of necessary implementing actions relating to such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act." 33 U.S.C. § 1342(a)(1)(B). In effect, ASLF suggests that any pollutant not governed by a specific standard must be the subject of a separate BPJ review. This argument misinterprets section 1342(a)(1)(B). In exercising BPJ, the permitting agency will be guided by the same considerations which govern development of effluent limitations. The agency thus may conclude that certain pollutants do not justify agency regulation. *See* 40 C.F.R. §§ 125.1; 125.3(c), (d).

> treats permits as establishing limited permission for the discharge of identified pollutants and a prohibition on the discharge of unidentified pollutants. Viewing the regulatory scheme as a whole, however, it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to disclosure requirements. Once within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits as long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants. 12 F.3d at 357.

The history of the CWA's regulation of toxic pollutants illustrates that imposing limits on every individual pollutant is neither feasible nor required by the Act. In the mid 1970's, the Natural Resources Defense Council ("NRDC") and other environmental groups brought suit against EPA challenging the agency's failure adequately to regulate toxic pollutants. The result of this lawsuit was a consent decree (the "NRDC Consent Decree") which has guided the agency's control of toxic pollutants ever since. *NRDC v. Train*, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom.*, *NRDC v. Costle*, 12 E.R.C. 1833 (D.D.C. 1979), *modified* by Orders dated October 26, 1982, August 2, 1983, January 6, 1984, July 5, 1984, January 7, 1985, April 24, 1986, and January 8, 1987. The NRDC Consent Decree required EPA, among other things, to adopt limits based on best available control technology economically achievable ("BAT") for toxic pollutants from a list of source categories in accordance with a court-ordered schedule. Appendix A to the Decree identifies the toxic pollutants EPA has to consider in promulgating the BAT limits. The toxics program set forth in the Decree, including the list of toxic pollutants, was incorporated into the CWA by Congress in 1977.[8] *See* Pub. L. No. 95-217 § 53, 91 Stat. 1566, 1589 (1977).

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[8] *See* 12 E.R.C. at 1834-36; *NRDC v. EPA*, 822 F.2d 104, 118 (D.C. Cir. 1987); *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229, 1238-45 (D.C.

(Footnote continued)

Paragraph 8 of the NRDC Consent Decree, as modified, authorizes EPA to exclude the following pollutants from regulation:

(1) not detected in industry effluents by state-of-the-art analytical methods,

(2) detected in the effluent from only a small number of sources and uniquely related to those sources,

(3) present only in trace amounts not causing or likely to cause toxic effects,

(4) sufficiently controlled by existing technologies on which other applicable guidelines or standards are based, or

(5) present in amounts too small to be effectively controlled by known technologies. *See* 12 E.R.C. at 1842.

This agreement reflects a recognition by both citizen groups and EPA that imposing limits on every individual pollutant is neither feasible nor required by the Act. It also reflects a recognition that discharging these "unregulated" pollutants does not violate the Act.

In support of its argument that CWA § 301(a) prohibits the discharge of "any" pollutant without a permit, ASLF cites *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977), in which the Court of Appeals for the District of Columbia Circuit struck down an EPA proposal to exclude "minor" polluters from the NPDES program. (ASLF Pet. 14-17) That decision is inapposite. *NRDC v. Costle* involved the wholesale exclusion of a category of dischargers from regulation. In the present case, by comparison, the permitting agency has been afforded ample opportunity to evaluate the facility's discharges and has simply elected not to regulate certain pollutants.

Cir. 1980), *cert. denied sub nom., Union Carbide Corp. v. NRDC*, 467 U.S. 1219 (1984); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub nom., Union Carbide Corp. v. NRDC*, 467 U.S. 1219 (1984).

ASLF repeatedly cites 33 U.S.C. § 1251(a) for the proposition that the goal of the CWA is to eliminate the discharge of pollutants into the navigable waters by 1985. According to ASLF, the interpretation of the CWA advocated by Kodak makes achievement of that goal impossible and must therefore be rejected. As previously noted, however, the 1985 date is a goal only and is not enforceable. *See* 117 Cong. Rec. S38800 (Nov. 2, 1971) (statement of Sen. Muskie). More important, the scheme described above should, in fact, result ultimately in the elimination of discharges of pollutants from point sources. Under 33 U.S.C. § 1311(d), EPA is required to review effluent limitations every five years and, if necessary, revise them. This and other provisions ensure that standards will become increasingly strict as water pollution control technology improves.

C. The Second Circuit's Decision is Consistent in Principle with the Supreme Court's Prior Clean Water Act Decisions and Does Not Conflict with Recent District Court Decisions.

To date, the Second Circuit is the only federal appeals court to address whether the CWA prohibits the discharge of pollutants for which the permit issuing agency has not developed a discharge limitation. There is thus no conflict between circuit courts concerning this issue.

Moreover, contrary to ASLF's assertions, the Second Circuit's decision does not conflict in principle with this Court's prior decisions involving the CWA. The decisions cited by ASLF address unrelated CWA issues. *See, e.g., City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (whether federal common law can be used to impose more stringent effluent standards than those set forth under the CWA); *Environmental Protection Agency v. California ex rel. State Water Pollution Resources Control Board*, 426 U.S. 200 (1976) (whether federal facilities must obtain an NPDES permit from a state with a federally approved permit program). Although this Court declared in *Milwaukee v. Illinois*, that "it is illegal for anyone to discharge pollutants into the nation's waters except pursuant to a permit," this statement merely restates a basic CWA proposition – that discharges from a point source require an NPDES permit. It does not resolve

the more complex question at issue here — whether the discharge of a pollutant not limited in an NPDES permit violates the CWA.

E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977), which ASLF cites extensively, does not support its narrow interpretation of the CWA. The Court in *DuPont* held that CWA § 301(b) authorizes EPA to establish effluent limitations for classes of plants; in so holding, the Court rejected petitioners' argument that CWA § 402(a) provides the sole authority for setting effluent limitations for existing plants. This holding does not dictate the result advocated by ASLF. To the contrary, many of the considerations which prompted the Court's decision in *DuPont* justify the opposite result. In particular, the Court in *DuPont* noted that "[t]he petitioners' view of the Act would place an impossible burden on EPA" by requiring the agency to consider individually "the circumstances of each of more than 42,000 dischargers who have applied for permits." *Id.* at 132. The approach advocated by ASLF would go one step farther, effectively requiring EPA individually to consider and set standards for each pollutant discharged from each individual facility, regardless of quantity or toxicity.[9]

The District Court opinions cited by ASLF either support Kodak or are inapposite. In *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F. Supp. 1182 (E.D. Ca. 1988), the District Court for the Eastern District of California held that the discharge of volatile organics, which were not referenced in the facility's NPDES permit, did not violate the CWA. In so holding, the court noted that federal regulations adopted by the state require the defendant to submit quantitative data for volatile organics in wastewater and to notify the state if the

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[9] Moreover, ASLF misapprehends the significance of the *DuPont* Court's discussion of the "permit shield" provision set forth in CWA § 402(k). The decision merely noted that the permit shield provision could not be used to allow deviations from CWA § 306, which requires EPA to set standards for newly constructed sources. 430 U.S. at 138 n.28. As discussed in Section B above, the effluent limitations at issue here were issued in full compliance with the relevant provisions of the CWA. The case thus does not run afoul of the *DuPont* decision.

facility has or will discharge pollutants not identified in the permit above specified levels. *Id.* at 1201-02 (citing 40 C.F.R. §§ 122.21(g)(7)(ii); 122.42(a)). According to the court, these provisions make clear that:

> discharges of volatile organics are not automatically prohibited just because they are not specifically allowed in an NPDES permit. Rather, NPDES applicants and permittees are required by regulation to keep the permit authorities fully informed of any past or potential discharges of volatile organics, and those authorities then determine the appropriate treatment of the discharges. [The defendant] has fully complied with this regulatory scheme. Furthermore, the state has never established a ban or even an effluent limitation for volatiles in [the defendant's] discharges.

Id. at 1202. Under these circumstances, the court concluded that it "is obvious that [the defendant] is not prohibited from discharging volatile organics." *Id.* The remaining decisions cited by ASLF are unreported and can be readily distinguished. *See Atlantic States Legal Foundation, Inc. v. Reynolds Metals Co.*, 31 E.R.C. 1156 (N.D.N.Y. 1990) (constitutional overbreadth challenge to New York's CWA implementing statute); *United States v. Tennessee Gas Pipeline Co.*, No. 91-1428 (W.D. La. Oct. 8, 1991) (involved allegations that the defendant failed to disclose in its permit application that it would discharge a particular substance); *United States v. Ketchikan Pulp Co.*, No. A92-587 Civ. (D. Alaska Oct. 5, 1993) (involved large "unintentional" discharges of pollutants which could not have been permitted expressly).

D. EPA Consistently has Concluded that the Clean Water Act Authorizes the Discharge of Pollutants Not Specifically Limited in an NPDES Permit.

1. *Introduction*

Since the adoption of the CWA in 1972, EPA consistently has interpreted the Act to authorize the discharge of pollutants not

specifically limited in an NPDES permit. EPA does not require facilities to submit information concerning every pollutant potentially discharged from a facility nor does it establish effluent limitations for every pollutant discharged. Numerous statements issued by the agency confirm that the discharge of such "non-limited" pollutants does not violate the CWA.

Citing this Court, the Second Circuit concluded that, "EPA's reasonable interpretations of the Act are due deferential treatment in the courts" since EPA is the "federal agency entrusted with administration and enforcement of the CWA." 12 F.3d at 358 (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984)). The standard for reviewing EPA regulations was articulated by this Court in *Chemical Manufacturers Association v. NRDC*, 470 U.S. 116 (1985), a case which also involved interpretation of section 301 of the CWA. According to the Court, in reviewing the EPA's interpretation of the CWA, the Court

> need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.

470 U.S. at 125. Quoting this language, the Second Circuit stated that "because EPA's implementation of the CWA is entirely reasonable, we defer to it." 12 F.3d at 358. ASLF has provided no basis for disturbing that conclusion.

ASLF is using this lawsuit to challenge EPA's and NYSDEC's approach to administering the NPDES/SPDES permit program. In effect, ASLF seeks to punish Kodak for decisions made by both EPA and NYSDEC. As set forth below, such a challenge cannot properly be brought under the citizen suit provisions of the CWA.

2. *EPA's Clean Water Act Implementing Regulations*

Since the adoption of the CWA in 1972, EPA consistently has interpreted the Act to authorize the discharge of pollutants not

specifically limited in an NPDES permit. As the Second Circuit noted, EPA declared as early as 1976 that both agency policy and the standard permit form provide "for a general authorization to discharge subject only to the conditions and limitations contained in the permit." Memorandum from EPA Deputy Assistant Administrator for Water Enforcement to Regional Enforcement Director, Region V, at 1 (Apr. 28, 1976). (JA.176-77) In support of its position, EPA noted that:

> *[I]t is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants.* Compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit. The permittee then would be in technical violation of his permit. (JA.177, emphasis added)

Consistent with the CWA, the NPDES permitting program developed by EPA focuses on soliciting information and establishing effluent limitations for those pollutants which pose the greatest environmental risk. Using a form known as "EPA Form 2C", EPA seeks monitoring data from dischargers concerning a specific list of pollutants identified in 40 C.F.R. § 122.21(g)(7).[10] In addition, pursuant to 40 C.F.R. § 122.21(g)(9),

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[10] All existing manufacturers seeking a permit must provide effluent monitoring data for seven specific conventional pollutants. 40 C.F.R. § 122.21(g)(7)(i). Applicants in specific industry categories (such as — in Kodak's case — photographic equipment and supplies) also must provide monitoring data for certain organic toxic pollutants, toxic metals, and other pollutants listed in the regulations. *Id.* § 122.21(g)(7)(ii). Applicants also must indicate whether there is reason to believe that certain other specifically listed pollutants are being discharged and to provide monitoring data as specified. *Id.* § 122.21(g)(7)(iii), (iv).

In developing the NPDES permit application, EPA "recognize[d] that the proposed list of pollutants for which effluent data must be provided is not exhaustive." 44 Fed. Reg. 34393, 34399 (1979). According to EPA, this approach

(Footnote continued)

applicants must provide EPA with a list of toxic chemicals which the applicant currently uses or manufacturers."

Using the information in the application, the permitting agency (*i.e.*, EPA or the delegated state agency) proposes limitations on pollutants discharged by the facility at significant levels. Consistent with the CWA, EPA's NPDES permit regulations require the establishment of limits on (1) all toxic pollutants which are or may be discharged at a level greater than the level which can be achieved by the application of the best available technology economically achievable, 40 C.F.R. § 122.44(e)(1), and (2) all pollutants which have the reasonable potential to cause or contribute to a violation of a state water quality standard. 40 C.F.R. § 122.44(d). These EPA rules do not require permits to contain limits on other pollutants, even though the permit application may indicate that other pollutants are routinely discharged.

Citizens faced with the potential discharge of "non-limited" pollutants can voice their objections throughout the permit issuance process. All draft NPDES/SPDES permits are subject to notice and public comment. *See* 40 C.F.R. §§ 124.10-.12. Citizens thus can comment on the permit before it is issued. (In fact, ASLF availed itself of this option with respect to Kodak's pending SPDES renewal application.) Members of the public also may request that a permit be modified to contain new or more stringent limits. *See* 40 C.F.R. § 124.5(a).

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was dictated, in part, by constraints on agency resources. "Consistent with the NRDC Decree and the 1977 amendments [to the Act], the Agency. . .concentrated its limited resources upon the worst problem, that is, the section 307(a) toxic pollutants." *Id.* In the same notice, EPA proposed to require permit applicants to submit data on all pollutants in their discharges. EPA subsequently eliminated this requirement, agreeing with commenters that it was "burdensome" and "not useful." 45 Fed. Reg. 33516, 33536 (1980). Accordingly, permit applicants are required only to submit data specifically called for by the permit application or the regulatory agency.

" In New York State, applicants comply with this requirement by completing an Industrial Chemical Survey form ("ICS") furnished by NYSDEC. The ICS requests information concerning approximately 144 "substances of concern." These substances of concern include specific chemicals as well as broad categories such as "unspecified metals," which potentially encompass numerous chemicals. (JA.98-99, 143-50)

To prevent future significant discharges of non-limited pollutants, EPA adopted 40 C.F.R. § 122.42(a), which requires dischargers to notify the permitting agency as soon as they know or have reason to believe that any activity has occurred or will occur which would result in the discharge above specified notification levels "of any toxic pollutant which is not limited in the permit."[12] This provision provides the permitting agency with the information necessary to determine whether to modify the permit pursuant to 40 C.F.R. § 122.62(a). In adopting the notification/modification scheme, EPA clearly contemplated that certain discharges of pollutants were so insignificant that no limitations were necessary. In fact, once the permit is issued, the permittee need not even notify the agency concerning these discharges unless they exceed certain specified thresholds.

The history of the section 122.42(a) notification provision illustrates the problem with ASLF's interpretation of the CWA. Originally, EPA proposed to adopt "application-based" effluent limits for pollutants which were reported or required to be reported in the NPDES application, but which were not specifically limited by the permit.[13] 43 Fed. Reg. 37078, 37079 (1978). Shortly thereafter, however, EPA rejected the "application-based" approach on the ground that it did not account for normal variability of pollutant levels in industrial waste

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[12] This provision was originally adopted as 40 C.F.R. § 122.61(a). EPA later renumbered this provision as section 122.42 and amended it (1) to establish different standards for routine and non-routine discharges, and (2) to eliminate a requirement that facilities notify EPA "[t]hat they have begun or expect to begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application under § 122.53(d)(9)." *See* 49 Fed. Reg. 37998 (1984). Section 122.42 is applicable to state administered permit programs. *See* 40 C.F.R. § 123.25(a)(13). The general provisions of Section 122.61(a), the predecessor to Section 122.42, were incorporated in Kodak's Permit as General Condition 2(a). (JA.64)

[13] This proposal would have limited the discharge of such pollutants to levels reported in the applicant's permit application. In addition, permittees would have been prohibited from discharging any pollutant for which information was requested in the permit application if no discharge was detected or reported.

streams. In its place, EPA proposed to establish effluent limits based on a multiple of either the amount reported in the application or of the detection limit. *See* 44 Fed. Reg. 34393, 34404 (1979).[14] Ultimately, EPA dropped even this minimum "application-based limit" requirement, concluding that such limits are unworkable because of anticipated variations in waste streams and exorbitant monitoring costs. 45 Fed. Reg. 33516, 33522 (1980). In place of the "application-based" standards originally proposed, EPA adopted the notification provision discussed above. *See* 40 C.F.R. § 122.42(a).

As the Second Circuit noted, in adopting this approach, EPA recognized that "*a permittee may discharge a large amount of a pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements [of the regulations].*" 45 Fed. Reg. at 33523 (emphasis added). EPA also acknowledged that "*the final regulations control discharges only of the pollutants listed in the permit application" and that this list "is by no means exhaustive of all chemicals which may be discharged". Id.* (emphasis added.) Subsequent EPA pronouncements reaffirm the notion that permit holders are allowed to discharge substances not specifically limited in their permits.[15]

ASLF criticizes the Second Circuit for relying on the 1976 EPA Memorandum discussed above, arguing that EPA contradicted it in a subsequent rulemaking. In support, ASLF quotes from the Federal Register notice issued by EPA in 1977 announcing EPA's intent to develop "application-based" limits. 42 Fed.

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[14] In making this proposal, EPA acknowledged that "*[n]o explicit limits are set for pollutants which are not required to be reported in the application.*" 44 Fed. Reg. at 34404 (emphasis added).

[15] In the preamble to the amended NPDES regulations, EPA stated that "pollutants not prohibited or limited by the permit can be discharged unless and until the permit is modified." 49 Fed. Reg. 37998, 38002 (1984). As the Second Circuit noted, EPA issued guidance as recently as 1992 reaffirming this approach with respect to water quality-based effluent limitations. 12 F.3d at 358.

Reg. 65209 (1977). In so doing, however, ASLF conveniently ignores the subsequent history of that rulemaking in which the agency abandoned the proposal as unworkable. *See* 44 Fed. Reg. 34393, 34404 (1979); 45 Fed. Reg. 33516, 33522 (1980). ASLF also ignores EPA's numerous other statements indicating that the discharge of "non-limited" pollutants is not prohibited. *See, e.g.*, 49 Fed. Reg. 37998, 38002 (1984).

3. *NYSDEC's Interpretation of the Clean Water Act is Similar to that Adopted by EPA.*

Authority to issue NPDES permits may be delegated to the states pursuant to 33 U.S.C. § 1342(b). All state programs must have legal authority to implement specific provisions of the federal NPDES regulations. These provisions, which are specified in 40 C.F.R. § 123.25, include all of the regulations discussed above.

As the Second Circuit stated, "[NYS]DEC's view of the SPDES permit is the same as EPA's." 12 F.2d at 359. In support of this statement, the Second Circuit noted, among other things, that General Condition 1(b) of Kodak's permit itself contemplates "new, increased or decreased discharges". (JA.64) The court also noted that the Permit contains General Condition 2(a), a notification provision similar to 40 C.F.R. § 122.42(a). This fact suggests that Kodak need not even notify NYSDEC of the discharge of toxic pollutants not limited in the permit if they are below certain concentrations. Based on this and other evidence, the court effectively concluded that NYSDEC implemented the SPDES program in the same manner as EPA — using the SPDES permit to identify and limit the most harmful pollutants while leaving the control of others to disclosure requirements. (*See also* JA.175 [addressing NYSDEC guidance documents concerning issuance of SPDES permits]; JA.126, 162 [discussing NYSDEC's decision *not* to establish a discharge limit for manganese, despite monitoring data showing it was being discharged]; JA.170-72 [September 1988 letter from NYSDEC discussing its decision *not* to regulate certain pollutants identified in Kodak's "Form R" reports discussed below]).

4. *EPA's Approach to Regulating "Non-Limited" Pollutants Protects Against Excessive Discharges.*

The regulatory scheme developed by EPA to implement the CWA ensures that the quality of the nation's waters is protected. Under the NPDES regulations, the permitting agency identifies those pollutants which pose the greatest environmental threat and establishes appropriate limitations. The permittee must then notify the agency in the event discharges of non-limited pollutants exceed specified threshold levels; if these discharges pose a concern, EPA can modify the permit to establish additional limitations.

Moreover, as EPA has recognized, the treatment required to meet BAT for pollutants specifically limited by the facility's NPDES permit indirectly controls other pollutants. *See* 44 Fed. Reg. 34393, 34400 (1979) ("even without direct controls on many pollutants, their levels will often by reduced incidentally by treatment equipment . . . "). The existing scheme thus prevents the uncontrolled discharge of pollutants.

5. *ASLF's Citizen Suit Represents an Improper Challenge to EPA's Permitting Regulations.*

The Second Circuit, in addressing the regulatory history of the CWA, concluded that "EPA has never acted in any way to suggest that Atlantic States' absolutist and wholly impractical view of the legal effect of a permit is valid." 12 F.3d at 357. To the extent ASLF believes that Kodak's discharge violated the CWA, its dispute is with EPA and NYSDEC, *not* with Kodak. Kodak complied fully with the requirements for obtaining an NPDES/SPDES permit. Kodak submitted all of the information requested by NYSDEC and cooperated fully with the agency during the permit review process. No evidence exists in the record to suggest that Kodak withheld any information from NYSDEC, nor does ASLF assert that Kodak in any way misled NYSDEC.

In effect, ASLF is using this citizen suit to challenge EPA's and NYSDEC's approach to administering the NPDES/SPDES

permit program. Such a challenge is clearly not authorized under the Act's citizen suit provision. *See Sun Enterprises, Ltd. v. Train*, 532 F.2d 280, 287-88 (2d Cir. 1976) (citizen suit could not be maintained to challenge manner in which EPA exercised its discretion in promulgating effluent limitations and issuing NPDES permits).

ASLF, like any member of the public, had several opportunities to challenge either the NPDES regulations generally, or the Kodak permit, in particular. CWA § 509(b) authorizes citizens to petition the United States Court of Appeals to review any effluent limitation promulgated under section 301. 33 U.S.C. § 1369(b)(1). However, any such action must be commenced within 120 days from the date of the relevant determination, unless the petition is based solely on information that arises after the 120th day.[16] *Id.* Any action that could have been reviewed under this section cannot be challenged in a civil or criminal enforcement action. 33 U.S.C. § 1369(b)(2).

In addition, as set forth above, the CWA implementing regulations contain extensive public notice and comment provisions. *See* 40 C.F.R. Part 124. To the extent citizens are concerned about the agency's approach to drafting a particular permit, they can raise their objections then.

As the above summary suggests, ASLF had at least two alternatives for addressing the concerns raised by the current lawsuit. First, they could have challenged the NPDES permitting regulations themselves. In the alternative, they could have raised objections to Kodak's permit during the public review period. ASLF failed to pursue either alternative; accordingly, this action is barred under 33 U.S.C. § 1369(b)(2). *See NRDC v. EPA*, 673 F.2d

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[16] Congress amended the statute in 1987 to extend the time period for filing from 90 to 120 days. Pub. L. No. 100-4, 101 Stat. 39 (1987). Courts have interpreted this requirement strictly, and have dismissed petitions filed after the statutory deadline. *See, e.g., American Ass'n of Meat Processors v. Costle*, 556 F.2d 875 (8th Cir. 1977); *Homestake Mining Co. v. EPA*, 584 F.2d 862 (8th Cir. 1978).

400 (D.C. Cir.), *cert. denied sub nom., Chemical Manufacturers Ass'n v. EPA*, 459 U.S. 879 (1982) (holding that NPDES rules are "other limitations" under 33 U.S.C. § 1369(b)(1)(E) and thus are reviewable only within the specified time period or not at all). Any other conclusion would effectively punish Kodak for decisions made many years ago by EPA and NYSDEC.

E. ASLF's Interpretation of the Clean Water Act Would Cripple the NPDES Permitting Program.

ASLF's petition identifies several "advantages" to its interpretation of the NPDES permitting scheme, chief among them that it "provides strong incentives for polluters to disclose and seek permission to discharge every pollutant coming from a facility." (ASLF Pet. 30-32) As discussed above, however, neither the federal nor State NPDES permit program solicits information concerning every pollutant potentially discharged from a facility nor do they establish limits for every pollutant potentially discharged. To the contrary, the success of the program hinges on EPA's ability to exercise discretion *not* to regulate "insignificant" discharges.

As the Second Circuit noted, "EPA lists tens of thousands of different chemical substances in the Toxic Substances Control Act Chemical Substance Inventory pursuant to 15 U.S.C. § 2607(b) (1988)." 12 F.3d at 357. If permittees were prohibited from discharging any substance not specifically limited in permits, permittees would inevitably insist that regulatory agencies develop limits for every substance that could conceivably be discharged, regardless of amount or toxicity. For large facilities such as Kodak Park, this list could theoretically include hundreds of substances. Since any permit limits would have to be based on the required treatment technology (*e.g.*, BAT) or applicable water quality standards, the issuance of each permit would be significantly delayed. Multiply this delay by the several thousand NPDES permits issued in New York State alone and the permitting process would inevitably grind to a halt.

The interpretation advocated by ASLF also raises significant technological obstacles. Under ASLF's approach, the discharge

of minute quantities of an "unauthorized" pollutant – non-detectable using EPA-approved analytical methods – would violate the CWA. Under these circumstances, courts would be forced to decide based on constantly evolving scientific standards whether the discharge of a tiny quantity of a substance, in fact, occurred. This result would be contrary to Congress' intent when it adopted the NPDES program (and abandoned reliance on water quality standards) – to provide for swift and direct enforcement of the CWA based on simple numerical standards. *See* S. Rep. No. 414, 92d Cong., 1st Sess. *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730 ("One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.")[17]

This need for certainty is particularly important in citizen suits. The legislative history of the CWA makes clear that citizen suits under 33 U.S.C. § 1365 are intended to enforce effluent limitations established administratively during the permit process. In particular, Senate Report 92-414 provides that the citizen suit provision under the CWA

> would not substitute a "common law" or court developed definition of water quality. An alleged

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[17] The problem with ASLF's approach is illustrated by its reliance on Kodak's Toxic Chemical Release Inventory Reporting Forms ("Form Rs") as evidence of "nonauthorized" discharges. (JA.31-33) These forms, which must be filed annually with EPA and NYSDEC under the Emergency Planning and Community Right-to-Know Act, attempt to quantify releases of several hundred chemicals during normal business operations. 42 U.S.C. § 11023. The Form Rs generally do not measure actual releases of chemicals, but instead estimate releases based on the amount of a particular chemical used and its fate during processing. (JA.103-06) In its notice letters and complaint, ASLF alleges annual "discharges" of pollutants as low as 2 pounds per year using information contained in Kodak's Form Rs. Since the discharges occurred over a period of a year, the amount discharged on a given day would be undetectable using EPA-mandated analytical methods. More important, ASLF could not hope to establish whether a particular chemical was actually discharged during a given day, week, month or year.

> violation of an effluent control limitation or standard, [sic] would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision. Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section. . . .

S. Rep. *supra*, *reprinted in* 1972 U.S.C.C.A.N. at 3745. *See United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984) (rejecting plaintiff's effort to intervene to prevent an "imminent and substantial endangerment" from a pollution source on the ground that 33 U.S.C. § 1365 was carefully restricted to actions where violations of standards and regulations are alleged); *State of New York v. United States*, 620 F. Supp. 374, 384 (E.D.N.Y. 1985) (rejecting citizen suit to enforce state water quality standards on the ground that "Congress intended that § 505 would create a private right of action only to enforce effluent limitations and standards that are administratively predetermined through NPDES permits issued under §§ 301, 302, 304, 306, and 307 [of the CWA]"). The current suit runs contrary both to the Act's limitations on citizen suits as well as to its more general goal of providing for swift and direct enforcement based on simple numerical standards.

POINT II

A CITIZEN SUIT UNDER SECTION 1365 OF THE CLEAN WATER ACT MAY NOT BE PREMISED SOLELY UPON A PROVISION OF STATE LAW WHICH IS BROADER THAN FEDERAL LAW.

As previously noted, New York State has been delegated authority to issue NPDES permits under the State Pollutant Discharge Elimination System ("SPDES") program, which is set forth at New York Environmental Conservation Law ("ECL")

Article 17, title 8.[18] Section 17-0815 of the ECL requires SPDES permits to state that "the discharge of any pollutant not identified and authorized by [the] permit. . . shall constitute a violation of the terms of the permit." This language was included as General Condition 1(b) of the Kodak permit. ASLF appears to be contending that this provision establishes that the Permit prohibits the discharge of any substance for which there is no express effluent limit.[19] The Second Circuit rejected this argument, concluding that

> even if Atlantic States is right about New York law,[20] the action would fail because New York would be implementing a regulatory scheme broader than the CWA, *see Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 809 F. Supp. at 1048, and such broader state schemes are unenforceable through Section 505 citizen suits. 12 F.3d at 359-60.

That conclusion should not be disturbed.

Under 33 U.S.C. § 1370, states may adopt and enforce their own effluent limitations or standards provided they are at least as "stringent" as comparable provisions under the CWA. Federal regulations governing EPA review and approval of state NPDES programs clarify this requirement, providing that:

> Nothing in this part precludes a State from: (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under

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[18] The State's NPDES implementing regulations are set forth at N.Y. Comp. Codes R. & Regs. tit. 6, Parts 750-758.

[19] It is unclear from ASLF's petition whether it is, in fact, contesting the Second Circuit's findings with respect to ECL § 17-0815. Although ASLF has included a "Question Presented" addressing this subject, the petition includes only a passing discussion of the impact of the New York statute. (*See* ASLF Pet. 44-45) In the interest of completeness, Kodak has addressed this issue briefly.

[20] As the Second Circuit noted, despite ECL § 17-0815 "[NYS]DEC's view of the SPDES permit is the same as EPA's." 12 F.2d at 359.

> this part; (2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program.

40 C.F.R. § 123.1(i). Although EPA has not yet issued any guidance on the question of what constitutes a "more stringent" requirement and what constitutes "greater scope of coverage" under 40 C.F.R. § 123.1(i), the agency has interpreted an identical requirement under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* *See* 40 C.F.R. § 271.1(i). (JA.174-75, 178-87) The agency concluded that a state program is broader in scope than the federal if (1) the state requirement increases the size of the regulated community beyond that of the Federal program or (2) the requirement lacks a direct counterpart in the Federal regulatory program. (JA.186). These "broader" requirements are not part of the federal program and thus are not enforceable by EPA. (JA.185)

In the present case, ECL § 17-0815 (and, by extension, General Condition 1(b) of the Permit), lacks a counterpart in the federal regulatory program – indeed, it is arguably contrary to the federal program, which authorizes the discharge of pollutants not specifically limited in an NPDES permit. Since ASLF, as a citizen "stands in the shoes of EPA" it cannot enforce a violation of ECL § 17-0815 (or General Condition 1(b)) under the federal citizen suit statute.[21]

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[21] As this Court has noted, plaintiffs in a citizen suit act as "private attorneys general" in place of the government. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987) (citizen suit "is meant to supplement rather than to supplant governmental action"). Since citizen plaintiffs "effectively stand in the shoes of the EPA," they cannot pursue citizen suits where EPA itself would be barred. *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 74 (3d Cir. 1990) (prohibiting citizen suit where EPA would be time barred), *cert. denied*, 498 U.S. 1109 (1991).

In its brief discussion of this issue, ASLF asserts that the Second Circuit "has misread not only the Act's goal of pollution elimination but also states' rights to adopt standards and conditions consistent with that goal." (ASLF Pet. 45). Kodak does not, however, question the State's authority to implement stricter provisions designed to achieve the goal of pollution elimination; it merely asserts that the CWA does not grant *citizens* the authority to enforce those provisions under 33 U.S.C. § 1365 *unless* the provisions have a federal counterpart. *See* 40 C.F.R. § 123.1(i). Exclusive authority to enforce such provisions rests instead with the state.

CONCLUSION

ASLF has failed to raise any arguments to suggest that its absolutist and wholly impractical view of the legal effect of an NPDES permit is valid and that the decision reached by the United States Court of Appeals for the Second Circuit was wrong. ASLF's Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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